No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

REPLY BRIEF OF TWOHY BROTHERS COMPANY AS CROSS-APPELLANT.

Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, *Judge.*

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SUBJECT INDEX

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We continue reference to Twohy Brothers Company as plaintiff, and to Northern Pacific Railway Company as defendant.

Defendant asserts (1) plaintiff's bill of exceptions is insufficient, and (2) no formal ruling was made by the trial court rejecting as representations of amount and character of work the evidence of representations upon which bids were invited. On the face of the record, defendant is in error as to (2), and, we submit, is in error as to (1).

(1) Rule 10, subdivision 2, of this court, is the same as rule 8 (formerly 7) of the Supreme Court. These rules call for the common law bill of exceptions (*Krauss Brothers Lumber Co. v. Mellon* (1928), 276 U.S. 386, 72 L. ed. 620, 622). The proper composition of such bill is explained in *Lincoln v. Claflin* (1868), 74 U.S. 132, 19 L. ed. 106, (top of second column, p. 108, L. ed.)

> "If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them."

This court has admonished the bar to refrain from imposing on the court the burden of searching through all of the evidence when such search is not necessary to present the legal point on appeal (*Metzler v. United States* (1933), 64 F. (2d) 203, 209).

On plaintiffs' first assignment the court is interested in the evidence rejected and that there was evidence pointing its materiality—not all the evidence, or the weight of evidence, but whether there was any evidence making the rejected evidence material.

Plaintiff's second assignment (error in limiting recovery on commercial haul) again called for a showing of evidence requiring a construction of the pleadings, not all the evidence, but the fact that there was such evidence. Plaintiff's second, third and fourth assignments could be presented without any bill of exceptions. Without a bill consideration of the second assignment would be limited to the primary record. (*O'Brien's 1937 Supplement*, p. 49. *Welch v. Hassett* (1937), 90 F. (2d) 833, 837 (1st CCA). *National Surety Co. v. Ulmen* (1934), 68 F. (2d) 330, 332 (9th CCA).)

PLAINTIFF'S ASSIGNMENT No. I

If defendant intends (brief p. 8) a confession of error in excluding competent evidence, we accept the confession and the results to follow. Those results are not what defendant seems to think. Reversal as to one cause of action does not necessarily reverse the entire case. The Appellate Court may reverse as to one cause

and affirm as to others. We repeat, there are four separate causes of action in one complaint, upon three of which plaintiff prevailed; on one defendant prevailed (plaintiff's opening brief, pp. 5-6). An appeal is only from the adverse part of a decision, and retrial may be limited accordingly. (*Santa Marina Co. v. Canadian Bank of Commerce* (1918), 254 Fed. 391, 397 (9th CCA), (certiorari denied 250 U.S. 643, 63 L. ed. 1186). *May Department Stores Co. v. Bell* (1932), 61 F. (2d), 830, 842 (8th CCA). *Gasoline Products Co. v. Champlin Refining Co.* (1931), 283 U.S. 494, 75 L. ed. 1188, 1191. *Twenty-one Mining Co. v. Original Sixteen to One Mine* (1920), 265 F. 469, 471 (9th CCA).)

The one case cited by defendant (*Empire Fuel Co. v. Lyons* (1919), 257 Fed. 890, 898 (6th CCA)) did not involve separate claims separately treated by the court. The complaint charged one breach of a contract. The court held that it could remand a case for new trial on a particular branch of a controversy, but could not, on the record before it, increase the damages in that case. It is not authority for a situation such as is presented in the case at bar.

(2) The trial court did formally reject as representations of amount and character of work the testimony of representations upon which bids were submitted. Defendant's labored argument to overcome the court's certificate was presented to the trial court. Defendants then formally asserted that the court had not ruled as stated, and moved to strike from plaintiff's bill of exceptions the question of rejection of evidence. The trial court then stated that the bill of exceptions correctly reflected his ruling on this evidence. He has so certified to this court (R. 344). We assume this certificate imports verity.

Defendant's argument that the findings foreclose plaintiff's attack on the rejection of this evidence, is, we submit, without merit. These findings were made *with the evidence of representations excluded.* That evidence was material to plaintiff's first and second causes of action. Without it, all showing of change of work and delay were cast aside by the court.

No argument is offered in support of the court's ruling with respect of this evidence of representations. We accept the implied admission the rejection was error. The court's certificate to plaintiff's bill of exceptions nullifies defendant's attempt to avoid the issue.

Defendant asks what plaintiff expects this court to do. Plaintiff expects this court to find the rejected evidence is material and competent: that its rejection was error and prevented a fair trial of plaintiff's first cause of action, and to order the case remanded for re-trial of the first cause with the rejected evidence received and considered.

PLAINTIFF'S ASSIGNMENT No. II

This assignment of error deals with the second cause of action—the commercial haul. The court's findings as to money involved in this cause covers separate periods of time (1) the haul to September 1, 1927, (2) the haul to October 25, 1927, (3) the haul to December 31, 1927, and finds the amount due for any one of the periods (R. 169). If other facts are sufficiently found to show plaintiff's right to recover beyond September 1, this court has the right to enter the appropriate judgment on this cause of action. Otherwise, this court may remand the case for re-trial of the right to recover beyond September 1, and to ascertain to what further date the right to conduct the log haul existed. Two qustions covered by the findings (plaintiff's right to

conduct the log haul, and the net amount due for each of the separate periods of time) need not be re-tried in the event the case is reversed on this appeal without entering a final judgment on the second cause of action in this court.

The federal courts are committed to the practice of sending cases back for limited re-trial, a practice clearly in furtherance of justice. (*Gasoline Products Co. v. Champlin Refining Co.* (1931), 283 U.S. 494, 75 L. ed. 1188, 1191. *May Department Stores Co. v. Bell* (1932), 61 F. (2d) 830, 842 (8th CCA). *Twenty-one Mining Co. v. Original Sixteen to One Mine* (1920), 265 Fed. 469, 471 (9th CCA).) Many authorities are cited in *May Department Stores Co. v. Bell, supra.* From it we quote (second column, p. 842):

"The issues are separate and distinct. It seems unjust that the plaintiff should be required to retry the issue of liability because of an erroneous instruction as to an item of damages. The finding of the jury should have put the question of liability at rest.

"At common law, a separation of issues and the remanding of a single issue was not allowed. Some courts still hold that it is not permissible. *Krummen Motor Bus & Taxi Co. v. Mechanics' Lumber Co.,* 175 Ark. 750, 300 S.W. 389; *McKeon v. Central Stamping Co.,* 264 F. 385 (C.C.A. 3).

"The Supreme Court, however, has held that a new trial may be granted, restricted to the issue of damages. The question first arose in *Norfolk Southern R. Co. v. Ferebee,* 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303, where such separation was hesitatingly allowed; and again appeared in *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 283 U.S. 494, 51

S. Ct. 513, 75 L. Ed. 1188. In the latter case it was contended that the granting of a new trial upon a single issue violated the Seventh Amendment. The court said (page 497 of 283 U.S., 51 S. Ct. 513, 514): 'It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all. This continued to be the rule in some states after the adoption of the Constitution; but in many it has not been followed, notwithstanding the presence in their Constitutions of provisions preserving trial by jury.'

"And, on page 499 of 283 U.S., 51 S. Ct. 513, 515: 'Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again. As the issues arising upon petitioner's cause of action on the royalty contract are clearly separable from all others and the verdict as to them already given is free from error, it need not be disturbed. But the question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried.'"

We think the primary record is sufficient for this court to conclude plaintiff is entitled to recover the stipulated price for the log haul to October 25. The contract gave defendant the right to terminate the contract under given circumstances, but no right to take any part of the work away from plaintiff. (Plaintiff's answering brief, pp. 21, 29-31.) The contract is not separable. The log haul as an incident of the entire contract was of importance to plaintiff's bid. So long as plaintiff continued to construct the railroad

it had a right as an inseparable part of its contract to conduct the commercial haul.

The court found that on October 7, 1927, *after the completion date named in the contract,* defendant ordered plaintiff to continue work constructing the railroad. Can a finding that plaintiff "was not permitted to continue" the log haul defeat plaintiff's right? Plaintiff was not "permitted" to conduct the log haul after July 17, 1927. That is the basis for the second cause of action. The affirmative finding that plaintiff had the right to conduct the commercial haul while constructing the railroad (R. 164), and that plaintiff's contract was continued after September 1 on order of defendant, presents the legal question of plaintiff's right to conduct the log haul during such continuance. Piecemeal taking of the road in bad faith to get the log haul (R. 168) precluded the "permission" argument. The portion of the road so taken October 12, 1927, was then, after the named completion date, in possession of plaintiff working under orders of defendant. We submit this court has the findings necessary for appropriate judgment.

Thus far we have discussed this assignment on the primary record. In plaintiff's bill is an exception (with stated reasons) to finding XVI (R. 320) on the subject of "permission." There is an exception to finding XVIII (with stated reasons) insofar as it limits the commercial haul recovery to logs hauled prior to September 1, 1927 (R. 322). Plaintiff duly requested a finding of delay caused by defendant (R. 316).

We submit the court erred in construing the pleadings as not claiming extension of time. The averments of the complaint are analyzed on our opening brief at pages 20-22. We think the complaint clearly pleads an extension of time to build the railroad, and that such extension covered every activity provided in

the contract. The court not only construed the pleadings (erroneously, we think) in his findings, but in his opinion clearly ruled that the *issue* of extension of time was not presented. (R. 339.) Defendant's effort to confine the claim of extension to construction work only, is, we think, without merit. It is grounded on the theory that the contract is separable, and assumes the right of defendant to make changes of work of any magnitude. The reserved right to change work is confined to incidental and not material changes (Plaintiff's opening brief, p. 14). Changes of magnitude are pleaded in plaintiff's complaint and averred as cause for extending the "time of completion *of said railroad*" (R. 20). The italicized words of the complaint are omitted from all quotations on defendant's brief. We deem them important as inconsistent with defendant's contention that the pleaded extension applied only to construction.

Defendant argues that the court's finding against representations at bidding, and therefore against change in work, makes moot the ruling that extension of time was not pleaded. This is a *non sequitur*. Findings, after erroneously excluding evidence that would result in different findings, if admitted, can hardly control construction of pleadings.

On this second cause we submit:

(1) On the primary record this court may enter judgment for the amount due plaintiff up to October 25, 1927, when the entire road was taken by defendant; that the contract is not separable; that the order given after September 1 to continue the contract is a definite extension of time; that the finding that plaintiff's contract entitled it to conduct the log haul while the road was under construction, and the finding of the amount due to October 25, complete the findings on

every issue necessary to entry of judgment in the appellate court. (2) If this conclusion cannot be drawn from the primary record, then we submit the court erroneously construed the pleadings; that the complaint does present the issue of extension of time, and the case should be remanded as to this cause of action for the limited purpose of trying the issue of extension of time.

PLAINTIFF'S ASSIGNMENT No. IV

We adhere to the order adopted on our opening brief, discussing assignment IV before assignment III. Defendant's discussion of IV is at page 42 of its answering brief.

Plaintiff repeatedly on opening brief stated its contention that the cause of action on the material haul was a simple claim for money not paid when due (Opening Brief, pp. 6, 7, 25, 27, 28). Defendant concedes plaintiff had this choice, but asserts it did not elect to sue for money due because (1) the lower court did not so consider it, and (2) propinquity. The failure of the lower court to allow interest *because* he declined to recognize the difference betwen the first and third causes of action resulted in appeal on this branch of the case. Stating a cause for damages for change of work and a cause for money due for specified work in one complaint, does not divest either of its true classification. Defendant does not attempt to answer this proposition covered in our opening brief at p. 27. It is elementary. The reply rests on the bare assertion of defendant, citing as authority the opinion of the lower court pursuant to which the judgment was rendered from which plaintiff is appealing. At risk of being tedious, we refer to the complaint. The three items covering material haul are alike in form, separately stated. The first averment is the provision of the con-

tract for hauling timber at a stipulated price (Par. XXII, R. 21). The second averment is the footage hauled for which at the contract price a stated sum should have been paid; that defendant has paid only part of the contract amount "leaving a balance due and owing plaintiff from defendant on this item of Thirty-five thousand one hundred twenty-one and 30/100 ($35,121.30) dollars, no part of which sum has ever been paid, although frequently demanded." (Par. XXIII, R. 21.) If these averments stood in a separate pleading as the gravamen of complaint, it would classify as an action to recover money due under contract. It is not changed by being in a complaint with other causes (*1 Bancroft Code, Pl.*, sec. 116, p. 224). So treated, the right to interest on the unpaid money from due date is clear.

The cases cited by defendant (B. p. 45) confirm our position as to the law in Oregon. Two of them (*Duncan Lumber Co. v. Willapa Lumber Co.* (1919), 93 Or. 386; 182 Pac. 172; 183 Pac. 476, and *Propst v. William Hanley Co.* (1919), 94 Or. 397; 185 Pac. 766) rest upon the authority of *Sargent v. American Bank and Trust Co.* (1916), 80 Or. 16; 154 Pac. 759; 156 Pac. 431, based on Oregon's interest code before the amendment of 1917. The Sargent case was expressly destroyed as authority by later decisions (Plaintiff's opening brief, p. 29). Neither of the cited cases involved a definite sum due by contract on a definite date. The Duncan case was an action to recover damages for refusal to deliver lumber, the market price of which had appreciated. The market price was to be ascertained. The only definite figure was the contract price, which became the offsetting amount. The Propst case was for damages for failure to deliver hay. Many controvesies, such as the cost of cutting, stacking, sale of hay to other parties, modifications of contract, refusal of

plaintiff to perform, etc., had to be determined. Both were typical damage actions.

The third case (*Obermeier v. Mortgage Co. Holland-America* (1927), 123 Or. 469; 259 Pac. 1064; 260 Pac. 1099; 262 Pac. 261) is far beside the mark. It was the third appeal, and refers to the earlier decisions for a statement of the case. These clearly mark it as an action for unliquidated damages without due date. The first appeal (98 Or. 195; 192 Pac. 283; 193 Pac. 915) states (98 Or. 197) that it is "an action for damages for breach of the covenants contained in a lease of real estate." The second appeal (111 Or. 14; 224 Pac. 1089) shows that the lease was made November 28, 1917 (111 Or., p. 16), that possession was not delivered and between January 24 and February 23, 1918, the lessee sued "claiming that he had been deprived of the privilege of obtaining possession of and preparing the land for cultivation" (111 Or., p. 18). The cases on plaintiff's opening brief (pp. 29-31) state the law in Oregon applicable to interest on definite sums not paid when due.

On plaintiff's opening brief (p. 29) the decision of this court in *New York Alaska Gold Dredging Co. v. Walbridge* (1930), 38 F. (2d) 199, 204 (9th CCA) was cited as being for money due under a service contract. We were discussing denial of interest on the *material haul* award. Defendant credits the reference to plaintiff's discussion of the *commercial haul* (B., p. 40). As to the material haul interest claim, it is clear authority. The principle can not be swept aside by calling it an employment contract. In the case at bar plaintiff contracted to haul bridge materials at a stipulated sum due on a given date. This court clearly stated the rule (38 F. (2d) 205) "Interest is generally recognized as the compensation awarded by law for the detention of money after it is due." By contract

this material haul money was due February 1, 1928, at the latest. We think this case authority for allowing interest on the commercial haul, also.

PLAINTIFF'S ASSIGNMENT No. III

Allowance of interest is a legal question. An appropriate declaration of law was requested (R. 318). The court not only refused the declaration, but in finding the amount due failed to include interest, to which failure a specific exception was reserved (R. 321-322). The assignment fully informs the court (R. 383). We don't understand the rules of the court to require more.

Defendant's suggestion that there was a conflict of evidence re amount of log haul (B., p. 33) is without merit. It is a continuation of the unsound argument that the haul would not have been accepted if plaintiff was to conduct it. The contract covered *all* hauling conducted over the road until it was completed. The hauling was conducted over the road. The amount was never in dispute. The contention of defendant was legal, not factual. (Plaintiff's answering brief, pp. 27-28.)

Allowance of interest was definitely excluded by the court: "The court therefore feels that under the Oregon statute, it is not bound to allow interest from the date of final estimate." (R. 342.) The question is whether interest should be allowed.

Defendant says this cause is an action for damages, and therefore can't carry interest. Plaintiff is claiming the stipulated price for all carloads of commercial freight that passed over the road before it was completed, claiming that under its contract this compensation should have been included in the final estimate (Par. XXI, R. 20-21). If the facts pleaded by plaintiff are sufficient to sustain a recovery on more than one

theory, no motion having been interposed to require a separation or election, plaintiff may recover on any theory presented by the complaint. (*Goodwin v. Rowe* (1913), 67 Or. 1, 10; 135 Pac. 171, 174. *Kaller v. Spady* (1933), 144 Or. 206, 216; 24 Pac. (2d) 351, 354-355.)

Interest is allowable in Oregon for breach of contract to *pay money* at a definite date. The court found the commercial haul a part of plaintiff's contract. Defendant says the log haul money is not due plaintiff because defendant had someone else haul the logs (B., pp. 32-37). Plaintiff's right to have the log haul money included in final estimate cannot be defeated by this action of defendant. This was part of plaintiff's contract. Defendant took the haul at the peril of paying plaintiff the contract price. Defendant asserts this *must* be an action for damages (not damages in the sense of money due on final estimate) *because* plaintiff did not haul the logs. That is, plaintiff's right can be defeated by defendant's wrong, and *because* defendant wronged plaintiff the latter cannot recover as of the contract due date. No authority is cited for this proposition.

The New York courts, under similar circumstances, upheld the right to have included in final estimate the agreed price for work wrongfully taken from a contractor, even though the contractor did not perform the work. We find no contrary decision.

Gallagher v. Hirsh (1899), 61 N.Y.S. 609; 45 App. Div. 467.

This case covers the exact situation. The complaint as finally presented contained two causes of action (the first and third pleaded). The first cause was for damages caused by misrepresentation at bidding (top p. 610). The third cause, like the log haul in the case at bar, was for an amount the architect refused to in-

clude in final estimate, the claimed amount consisting of the contract price for work *which defendant took from plaintiff and gave to another*, plus a small claim for extras. (Bottom p. 610.) Defendant denied that the claimed payment had matured, or was due and owing to the plaintiff (bottom p. 611). The fact was that before plaintiff had completed certain work, it became necessary to make additional soil excavation (bottom p. 612), which work was let to Sooysmith & Co. "In doing this additional work of excavation, etc., Sooysmith & Co. necessarily performed part of the work originally included under the plaintiff's contract, viz., part of the plaintiff's excavations, and a part of the shoring and underpinning of Chickering Hall, which was next to the lot in question. It is claimed upon the part of the defendant that the reasonable value of this omitted work should be deducted from the amount due to the plaintiff, and the plaintiff claimed that there should be no deduction * * * because the defendant had no right to take the contract away from plaintiff, and give it to Sooysmith & Co." (middle p. 613). The court held that there could be a recovery as for money due on final estimate (Plaintiff's answering brief, p. 31). The trial court, in measuring recovery, failed to require deduction of the cost of doing the work, and for that reason alone the case was reversed. Interest was allowed as for money not paid when due (p. 614).

We think it immaterial whether the recovery be called damages or something else. It is for money covering work which plaintiff contracted to do, and for which it was entitled to be paid on the contract due date. In the State of Oregon interest accrues on money after it is due. The recent cases are collated in plaintiff's opening brief at pp. 28-32. The cases cited by defendant are discussed in this brief at pp. 10-11. When

the facts in each of these cases cited by defendant are considered, each lacks the requisites of definite due date, and amount certain or ascertainable by calculation.

We submit plaintiff's claim for the log haul is a claim for money due at final estimate, and it was error to deny interest from the due date.

Respectfully submitted,

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